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IN THE

Supreme Court of the United States

No. 1038

October Term, 1962

MAY SPACH, Trustee,

Petitioner,

versus

HERBERT M. FISHER, Bankrupt, and
DRAKE OPERATING CO., INC.,

Respondents.

On Petition For a Writ of Certiorari To the United States Court of Appeals For the Fifth Circuit

BRIEF FOR RESPONDENT IN OPPOSITION

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INDEX

	Page
OPINIONS BELOW	1
JURISDICTION	2
QUESTION PRESENTED	3
STATUTES INVOLVED	4
STATEMENT OF THE CASE	4
ARGUMENT	5
CONCLUSION	9
CERTIFICATE OF SERVICE	10

CITATIONS

Cases	Page
B. F. Avery & Sons Co. v. Davis, 5 Cir., 1951, 192 F.2d 255, cert. den., 342 U.S. 945, 72 S. Ct. 559, 96 L. Ed. 703	2, 7
Cline v. Kaplan, 1944, 323 U.S. 97, 65 S. Ct. 155, 89 L. Ed. 97	2, 7
Hyman v. Cohen, Fla. 1954, 73 So.2d 393	9
Nicholas v. Peter Pan Snack Shop, 5 Cir., 1958, 256 F.2d 349	7
Spach v. Fisher, 310 F.2d 328 (1962)	6, 7
Spach v. Johnina, 291 F.2d 619	6, 7
Wisniewski v. United States, 353 U.S. 901	7
Statutes	
Section 24(c) of the Bankruptcy Act (11 U.S.C. Sec. 47)	2
28 U.S.C. Sec. 2101(c)	3, 6
Section 23(a) and 2(a)(7) of the Bankruptcy Act [11 U.S.C. Secs. 46(a) and 11(a)(7)]	3, 4
Texts	
§ 23.07, Volume 2 Collier on Bankruptcy	8
~~§ 2307, Volume 2~~	~~8~~
Remington on Bankruptcy, Volume 5A, § 2428	8

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OPINIONS BELOW

Petitioner, May Spach, Trustee, seeks to have this Court review the judgment and opinion of the United States Court of Appeals, Fifth Circuit rendered and filed on November 28, 1962, reported at 310 F.2d 328 (1962) (App. III of Petition) which said judgment affirmed an Order of the United States District Court, Southern Dis-

trict of Florida, Miami Division, dated December 8, 1961, (App. II of Petition) reversing a ruling made by the Referee in Bankruptcy (App. I of Petition) and holding that the Respondent, Drake Operating Co., Inc., had seasonally raised the issue of the want of jurisdiction and that upon the record that the Referee's Order Directing Turnover be reversed, set aside and held for naught. In its written opinion of November 28, 1962, the United States Court of Appeals, Fifth Circuit held that the Appellee (Respondent here) was entitled to have the merits of the claim adjudicated in a plenary suit with the rights and remedies incident thereto, and in support thereof, relied upon **Cline v. Kaplan**, 1944, 323 U.S. 97, 65 S. Ct. 155, 89 L. Ed. 97, and **B. F. Avery & Sons Co. v. Davis**, 5 Cir., 1951, 192 F. 2d 255, cert. den., 342 U.S. 945, 72 S. Ct. 559, 96 L. Ed. 703.

The Order of the United States Court of Appeals, Fifth Circuit denying the Petition for Rehearing filed by the Appellant (Petitioner here) was entered January 17, 1963.

JURISDICTION

The Petitioner seeks to invoke the jurisdiction of this Court under Section 24(c) of the Bankruptcy Act (11 U.S.C. Sec. 47). However, the Petition for Writ of Certiorari to review the judgment from the United States Court of Appeals, Fifth Circuit was not filed in this Court until April 22, 1963, some ninety-five (95) days after the filing of the Order Denying the Petition for Rehearing in the United States Court of Appeals, Fifth Circuit on January 17, 1963. Therefore, this Court is without jurisdiction to consider the Petition for Writ

of Certiorari, by reason of 28 U.S.C. Sec. 2101 (c) limiting the time for filing such petitions to ninety (90) days.

Furthermore, the Petitioner has not complied with Rule 19 of the Revised Rules of the Supreme Court of the United States, in that the Petition for Writ of Certiorari does not set forth any special and important reason for the granting of the Petition; nor does it contend that the United States Court of Appeals, Fifth Circuit has rendered a decision in conflict with a decision of another court of appeals on the same matter; or decided an important state or territorial question in a way in conflict with applicable state or territorial law, or has decided an important question of federal law which has not been, but should be, settled by this Court; or has decided a federal question in a way in conflict with applicable decisions of this Court; or has so far departed from the accepted and usual course of judicial proceedings or so far sanctioned such a departure by a lower court as to call for an exercise of this Court's power of supervision.

QUESTION PRESENTED

Whether the District Court and United States Court of Appeals, Fifth Circuit, correctly held that the Referee in Bankruptcy had improperly exercised summary jurisdiction in a Petition for Turnover under Section 23(a) and 2(a)(7) of the Bankruptcy Act, (11 U.S.C. Secs. 46(a) and 11(a)(7)) where:

(1) Respondent properly and timely interposed an objection to the summary jurisdiction of the court of bankruptcy on a Trustee's Pe-

tition for Turnover of a $133,000.00 security deposit retained by the Respondent-landlord upon bankrupt tenant's default under a lease prior to the bankruptcy; and, where,

(2) After a preliminary hearing it appeared that a real and substantial controversy exists and the applicable law supports the contention of the Respondent that it is entitled to retain the security deposit.

STATUTES INVOLVED

The pertinent provisions of the Bankruptcy Act, 11 U.S.C. Secs. 11(a)(7) and 46 are set forth in the Petition at pages 3 and 4.

STATEMENT OF THE CASE

May Spach, Trustee in Bankruptcy, Petitioner here, petitioned the bankruptcy court for an order requiring the turnover of a security deposit of $133,000.00, under a lease agreement in which the bankrupt was one of the lessees by way of assignment and which this Respondent, Drake Operating Co., Inc., was lessor by way of assignment.

Long prior to the filing of the bankruptcy proceedings the lessee was in substantial default under the terms and provisions of the lease, particularly with respect to the payment of rent obligations thereunder, and by June of 1959, there was an arrearage of rent in the sum of some $23,500.00, as reflected by Schedule A-1 of the bankrupt's schedules, and as testified to by the bankrupt.

Herbert M. Fisher (T 76). Therefore, at that time, prior to the bankruptcy, the Respondent, Drake Operating Co., Inc., as lessor, had a right to terminate the lease and repossess the premises under the terms and conditions of the lease. The necessity for taking court action was obviated by the lessee surrendering the premises prior to the bankruptcy.

The Respondent-landlord, Drake Operating Co., Inc., did timely and properly raise the question of lack of jurisdiction in and by the Motion to Set Aside Order and Dismiss Petition (T 1-2) and by its Answer (T 7-10).

The Trustee, Petitioner here, had initially petitioned for an Order to Show Cause against Midcentury Corp., as alleged lessor, but upon showing before the court at a hearing held November 17, 1959, that Midcentury Corp. had been dissolved and Drake Operating Co., Inc., had succeeded to the lessor's interest under the lease, the initial petition was dismissed and the answers stricken (T 12). The Trustee then filed the Petition for Turn Over Order naming Drake Operating Co., Inc., as Respondent, on November 18, 1959, (T 3-5) and the Referee entered his Order to Show Cause thereon on November 20, 1959, (T 6-7). The first hearing thereon was held November 30, 1959, (T 11 et seq.).

ARGUMENT

We think that this Court is without jurisdiction to consider the Petition for Writ of Certiorari filed herein by the Petitioner, by reason of its not having been filed within the time permitted by the jurisdictional statute.

to-wit: 28 U.S.C. Sec. 2101 (c), as set forth in the section on Jurisdiction hereinabove.

(1) The Respondent, Drake Operating Co., Inc., properly and timely interposed an objection to the summary jurisdiction of the bankruptcy court of the Trustee's Petition for Turnover of the $133,000.00 security deposit retained by it. It filed its Motion to Set Aside Order and Dismiss Petition (T 1-2) and its Answer (T 7-10) prior to any hearing on the merits having been held, in and by which said motion and answer the facts and law upon which it relied were set forth. This conclusively defeats any argument that the Respondent, Drake Operating Co., Inc., had consented to the jurisdiction of the bankruptcy court under Sections 23(a) and 2(a)(7) of the Bankruptcy Act (11 U.S.C. Secs. 46(a) and 11(a)(7)).

The Petitioner in her Petition for Writ of Certiorari to the United States Court of Appeals, Fifth Circuit, does not cite any decision of any United States court of appeals of any other circuit or of the Supreme Court of the United States in conflict with the decision of the United States Court of Appeals, Fifth Circuit, attempted to be reviewed here, to-wit: **Spach v. Fisher**, 310 F.2d 328 (1962).

On the contrary, the Petitioner argues only that the decision in **Spach v. Fisher** is seemingly in conflict with the decision and opinion of the same Fifth Circuit in the prior case decided by it on June 21, 1961, to-wit: **Spach v. Johnina**, 291 F.2d 619.

However, the United States Court of Appeals, Fifth Circuit says in **Spach v. Fisher**, 310 F.2d 328, at page 330:

"Under our view appellee (Respondent here) was entitled to a plenary hearing on the merits. The law on the question is well settled in this circuit." As authority it cites **B. F. Avery & Sons Co. v. Davis,** *supra*, and further on page 330:

> "We reiterated in Nicholas v. Peter Pan Snack Shop, 5 Cir., 1958, 256 F. 2d 349, that upon summary inquiry, if it appears that possesion before bankruptcy is adverse and asserted in good faith, the referee may not adjudge the merits of the claim but the trustee must seek relief by plenary suit. The exception there but not here involved is where summary jurisdiction is based upon the consent of the adverse claimant. Chapter 2, Bankruptcy Act, § 11, sub. a(7), 11 U.S.C.A. § 11, sub. a(7)."

It then goes on to distinguish factually its decision in **Spach v. Johnina.**

Even if **Spach v. Johnina** were not clearly distinguishable from the instant case, **Spach v. Fisher,** it is well settled that a conflict within a circuit is not a basis for the granting of a Petition for Writ of Certiorari by the Supreme Court. **Wisniewski v. United States,** 353 U.S. 901. The decision of the United States Court of Appeals, Fifth Circuit, in this case not only is not in conflict with any decision of this Court but relies upon, and follows the decision of this Court in **Cline v. Kaplan,** *supra.*

The leading bankruptcy text writers agree that the decision of this Court in **Cline v. Kaplan,** and therefore

the decision of the United States Court of Appeals, Fifth Circuit, attempted to be reviewed in and by the petition here, represents the proper interpretation of the Bankruptcy Act. In **Remington on Bankruptcy**, Volume 5A, § 2428, it states:

> "The issue raised by objection that respondent is entitled to plenary suit is the narrow one of whether or not he has more than a merely colorable claim to the property. If he has, the bankruptcy court can proceed no further as against the objection. It is not its function, or within its jurisdiction, to pass upon whether the claim should or would prevail if fully litigated, but only upon whether the objector is entitled to have it litigated by ordinary action or plenary suit."

Collier on Bankruptcy, 14th Edition, is in agreement. Among other things, in § 23.07, Volume 2, it states:

> "Whether or not a claim is adverse so as to defeat summary jurisdiction depends upon whether the claim is substantial and real, or merely colorable. An adverse claim is substantial if the evidence offered as a basis is sufficient, if uncontroverted, to establish the validity of the claim; but a claim is not to be deemed merely colorable, so as to give the bankruptcy court summary jurisdiction, if its validity depends upon disputed facts as to which there is a conflict of evidence as well as a controversy in matter of law. It is now well settled that if there is a real and substantial controversy of

law or fact as to property held adversely to a bankrupt — 'a contested matter of right, involving some fair doubt and reasonable room for controversy' — the bankruptcy court is 'without jurisdiction' to adjudicate the matter, but the trustee must have resort to a plenary suit."

(2) A real and substantial controversy does exist as to whether or not the Respondent, Drake Operating Co., Inc., is entitled to retain the $133,000.00 security fund in its possession and the applicable law supports its contention that it is so entitled.

Under the authority of **Hyman v. Cohen**, Fla. 1954, 73 So.2d 393, which expressly overruled and modified all previously decided Florida cases in conflict with it, the Respondent would be entitled to retain the security fund. The United States Court of Appeals, Fifth Circuit, cited that case but did not decide that issue, holding instead that a court on a plenary hearing must determine this question.

CONCLUSION

For the foregoing reasons it is respectfully submitted that this Petition for Writ of Certiorari should be denied.

Respectfully submitted,

JOSEPH GASSEN
Counsel for Respondent,
Drake Operating Co., Inc.

CERTIFICATE OF SERVICE

THIS IS TO CERTIFY that a copy of the foregoing Brief has this 24th day of May, 1963, been mailed to FRANK, WESTON & STREEKOW, Attorneys for Petitioner, May Spach, Trustee, 1335 Lincoln Road, Miami Beach, Florida, and to PHILLIPS & PHILLIPS, Attorneys for Respondent, Herbert M. Fisher, Bankrupt, Seybold Building, Miami, Florida. I further certify that all requirements of Supreme Court Rule 33 (1) have been followed.